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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 405

JOSEPH M. TAUSSIG,

Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST NO. 4954,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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7 Moore's Federal Practice, Second Edition, Sec. 60.25(4), page 274 14

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AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST No. 4954,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner, Joseph M. Taussig, Respondent and Defendant-Appellant in the proceedings below, petitions this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Seventh Circuit to review the judgments of that Court entered April 2, 1958, affirming two orders entered by the United States District Court for the Northern District of Illinois, Eastern Division, on June 26, 1957, the first of which permanently restrained and enjoined Petitioner from prosecuting a certain action at law against American National Bank and Trust Company

of Chicago in the Superior Court of Cook County, Illinois (App. 191), and the second of which denied the motion of Petitioner to vacate and set aside a certain final decree entered in said Court on June 4, 1947, and all proceedings supplemental thereto (App. 190).

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 255 F. 2d 765 under the caption "*American National Bank and Trust Company of Chicago, as Trustee, etc.* v. *Joseph M. Taussig*" and also is set forth in the Appendix to this Petition.

The United States District Court for the Northern District of Illinois, Eastern Division, rendered no opinion.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgments of the United States Court of Appeals sought to be reviewed, were entered April 2, 1958 (Rec.). A petition for rehearing was denied by said Court of Appeals on July 2, 1958 (Rec.).

This Court has jurisdiction to review the judgments in question by the issuance of a Writ of Certiorari under 28 U. S. C. § 1254(1). This petition is filed within ninety days after the denial of said petition for rehearing by said Court of Appeals, as required by 28 U. S. C. § 2101(c).

THE QUESTIONS PRESENTED FOR REVIEW.

The primary question presented for review is whether a United States District Court could properly restrain a State Court proceeding by one defendant in a cause formerly pending in the District Court upon which a final

decree had been entered, against a co-defendant with respect to whom the District Court's original jurisdiction had not been litigated, it appearing on the admitted facts that the District Court had no jurisdiction of the original action by reason of the absence of diversity of citizenship between parties plaintiff and parties defendant in that proceeding.

A subsidiary question is presented as to whether, with respect to that Respondent, want of federal jurisdiction to enter the original decree having been called to the attention of the Court by a proper motion under Rule 60(b) of the Rules of Civil Procedure for United States District Courts, the District Court could properly summarily decline to entertain said motion.

STATUTES AND RULES INVOLVED.

Former section 24 of the Judicial Code as amended (28 U. S. Code Annotated 1927 Edition, Section 41, page 32) which provided as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "(1) *United States as plaintiff; civil suits at common law or in equity.*
>
> First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. and * * * (b) is between citizens of different states * * *."

28 U. S. Code (1952 Edition), Sec. 2283, p. 4410:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Rule 60(b)(4) of the Rules of Civil Procedure for United States District Courts, 28 U. S. Code (1952 Edition), Rule 60, p. 4344:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void; * * * The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

STATEMENT OF THE CASE.

This litigation arises out of a suit for breach of trust and an accounting filed by Ruth Taussig Saxelby, a sister of Petitioner, and a citizen and resident of New York, on behalf of herself and all other beneficiaries under the Trusts created by the Will of Maurice Taussig, deceased, against Petitioner, a citizen of Illinois, Respondent American National Bank and Trust Company, as Trustee, and one Irvin H. Robitshek of Minnesota, co-trustee with Petitioner of the trusts created by said Will. This suit was filed in the United States District Court for the Northern District of Illinois, Eastern Division, on December 20, 1945 (Tr. 13-16)*

Petitioner was a co-executor and a co-trustee under the Will of his father who died testate in Chicago, Illinois, August 2, 1931 (Tr. 2, 128). The estate was then insolvent (Tr. 85). Petitioner, with approval of the Probate Court of Cook County, Illinois, negotiated an arrangement whereby a mortgage on an apartment building known as 4850 Drexel Boulevard, Chicago, Illinois, comprising one of the assets of the estate, was cancelled, the property was converted into small apartment units and Petitioner purchased the property at an executor's sale and caused title to be conveyed to Respondent, American National Bank and Trust Company of Chicago, as trustee for Petitioner alone under its Trust No. 4954 (Tr. 91, 134, 135).

* The designation "Tr." refers to the page number of the Appendix in *Ex Parte Joseph M. Taussig, Petitioner*, No. 9586 in the United States Circuit Court of Appeals for the Seventh Circuit, October Term 1947, which contains all of the material pleadings in the original case of *Saxelby, et al. v. Taussig, et al.*, No. 45C 2271 in the United States District Court for the Northern District of Illinois, Eastern Division, and by stipulation was made a part of the Record on Appeal in this cause. The designation "App." refers to Appellant's Appendix in Cause No. 12137-38 in the United States Court of Appeals for the Seventh Circuit, and the designation "Supp. App." refers to the Supplemental Appendix filed by Appellees in said Cause No. 12137-38.

The principal beneficiary under the Will of Maurice Taussig and the trusts created thereby was Petitioner's brother, Leo Taussig, an incompetent, for whose benefit a trust sufficient to provide an income of $5,000.00 per annum for life was created which was made a first lien on the entire trust estate (Tr. 23, 24, Trust Tr. 21-37). At the time the principal litigation below was commenced (December 20, 1945, Tr. i 1) there never had been sufficient income to provide for Leo (App. 61). In Ruth Saxelby's complaint, Leo Taussig was alleged to have been a resident of Wisconsin, in which State he had been residing in a sanitarium (Tr. 2). Leo actually was a citizen and resident of Illinois at the time he became incompetent (Tr. 149).

The question of want of Federal jurisdiction by reason of absence of diversity of citizenship between the defendant trustees and certain other beneficiaries (Fannie Daus—Petitioner's aunt—a resident of Illinois; and Ella Robitshek—Petitioner's sister—a resident of Minnesota) was raised at the outset by Petitioner and by Respondent, his co-defendant (Tr. 38, 42, 51, 58, 59). That Leo Taussig was actually a citizen and resident of Illinois was called to the attention of the Court on May 19, 1947 (Tr. 149-152), a date after the Court had found Petitioner guilty (Tr. 111) but before the Court entered its decree (Tr. 158-161). Leo Taussig had died on February 19, 1947 (Tr. 159). On June 2, 1947, the Court entered its Findings of Fact that Leo Taussig was at the time of the institution of the proceedings a citizen and resident of Illinois (Tr. 159) but Petitioner's motion to dismiss for lack of jurisdiction was overruled (Tr. 162) and the final decree dismissed Leo Taussig as a party by reason of his death (App. 29, Tr. 163).

The Court's decree of June 4, 1947 directed Petitioner to direct Respondent to transfer the Drexel property to a

successor trustee (The Northern Trust Company). It also directed Respondent to transfer the property (Tr. 163-5). Petitioner immediately directed Respondent to appeal from the decree and to direct Chicago Title and Trust Company which had guaranteed the title to the Drexel property likewise to appeal (App. 160). Respondent, instead of appealing, forthwith resigned its trust (App. 151, 160) and conveyed without directions from Petitioner, the Drexel property to the successor trustee (App. 151, 160). Thereafter, in a stipulation to which Respondent was not a party, Petitioner agreed not to appeal from the decree of June 4, 1947 (App. 91-93). The District Court continued from time to time expressly to retain jurisdiction of the cause of Saxelby *vs.* Taussig for the purposes of instructing the successor trustee and the like until the present time (App. 106, 107, App. 109-123, App. 133-141).

On June 6, 1957, Petitioner filed a suit against Respondent in the Superior Court of Cook County, Illinois, alleging a breach of agreement in conveying the Drexel property contrary to and without his authorization and direction (App. 161-163). Thereafter, Respondent filed its petition in the case of *Saxelby v. Taussig*, praying for a permanent injunction enjoining Petitioner's Superior Court suit and for a mandatory order directing Petitioner to execute a written direction to Respondent to convey the Drexel property *nunc pro tunc* as of June 6, 1947, the date of its conveyance (App. 153). On June 26, [illegible] the District Court granted the relief prayed for (App. 19[illegible]3) summarily without affording Petitioner an opportunity to file an appropriate responsive pleading (App. 180, 182, 184). At the same time, Petitioner's motion under Rule 60(b) of the Rules of Civil Procedure for United States District Courts to Vacate the Decree of June 4, 1947 because it was void for want of federal jurisdiction was summarily denied (App. 184, 190). On appeal both of

these orders were affirmed by the United States Court of Appeals for the Seventh Circuit (App. this Petition).

JURISDICTION OF THE COURT BELOW.

The United States District Court for the Northern District of Illinois, Eastern Division, did not have federal jurisdiction of the original breach of trust proceeding brought by Ruth Saxelby. This want of federal jurisdiction was called to the attention of that Court when Respondent's petition to enforce compliance with the Court's decree was first presented (App. 174) and simultaneously therewith was formally called to the attention of the court below by Petitioner's motion under Rule 60(b)(4) of the Rules of Civil Procedure for United States District Courts, praying that the Court's decree of June 4, 1947, and all subsequent proceedings in the cause be vacated and set aside for want of federal jurisdiction (App. 142-148).

ARGUMENT.

The Injunction Permanently Restraining Prosecution of Proceedings in the Superior Court of Cook County, Illinois.

Had the United States District Court for the Northern District of Illinois heeded the decision of this Court in *Mitchell* v. *Maurer*, 293 U. S. 237, 79 L. Ed. 162, 55 S. Ct. 162 (293 U. S. at p. 244): "Unlike an objection to venue, lack of Federal jurisdiction cannot be waived or be overcome by an agreement of the parties" that Court would *sua sponte* have dismissed the cause before the trial had proceeded. The mere fact that Leo Taussig, who was the real party plaintiff and was the only party plaintiff with respect to whom an actual collision of interest existed at the time of the filing of the complaint in the United States District Court, was aligned by plaintiff, Ruth Saxelby, as a party defendant, is of no significance. As this Court determined in the case of *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, at page 69: "Diversity of jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants. It is our duty, as it is that of the lower courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'"

With respect to Respondent, American National Bank and Trust Company, a co-defendant with Petitioner in the original proceedings and as to whom Petitioner conducted no adversary litigation either on the subject matter of federal jurisdiction or otherwise, in that proceeding, did Petitioner's subsequent action in failing to appeal from the decree of the United States District Court operate

so as to bestow upon that Court federal jurisdiction theretofore lacking? In this proceeding the United States District Court and the United States Court of Appeals for the Seventh Circuit so held, notwithstanding any action to which Respondent was a party upon which any estoppel could be based. In so holding, we respectfully submit, the decisions of the courts below are in conflict with the decisions of other Courts of Appeals in two respects:

First: It is a principle uniformly applied by all United States Courts of Appeals which have had occasion to pass upon the question that with respect to jurisdiction or otherwise, *res judicata* does not apply between co-parties who were not adversaries in the proceedings relied upon as constituting a former adjudication of the issues. The Court is referred to the decision of the United States Court of Appeals for the Ninth Circuit in *Dobbins* v. *Barnes*, 204 F. 2d 546, at page 548, where that Court stated:

> "It is a rule of universal application that 'parties to an action are not bound by the judgment, in a subsequent controversy with each other unless they were adversary parties in the original suit.'"

The Court is also referred to the Fourth Circuit case of *City Bank of Wheeling* v. *Rhodehamel*, 223 F. 979, 983, and the Tenth Circuit case of *Ohio Casualty Company* v. *Gordon*, 95 F. 2d 605, 609.

Second: The courts below overlooked the fact that by its own decree the United States District Court for the Northern District of Illinois specifically found as a fact the Illinois citizenship and residence of Leo Taussig and the jurisdictional defect therefore appeared on the face of the record and as such was always open to attack.

The Court is referred to *State of Missouri* v. *Title Guarantee & Surety Co.*, 72 F. 2d 595, where the Court of Appeals for the Eighth Circuit said (p. 598): "If the record

discloses jurisdictional defects which render the judgment void, then it is subject to collateral attack in a law action."

The Court is also referred to the more recent case in that same Circuit of *Mitchell* v. *Village Creek Drainage District*, 158 F. 2d 475, in which that court said (p. 478): "Be that as it may, it cannot, we think, be gainsaid that a judgment void on its face for want of jurisdiction may be attacked either in a direct proceeding or collaterally."

The United States Court of Appeals in this proceeding gave no serious consideration to the point here urged apparently believing the subject to be foreclosed by this Court's opinions in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371; *Stoll* v. *Gottlieb*, 305 U. S. 165; and *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, which are to the general effect that the facts upon which federal jurisdiction is based are categorized as quasi-jurisdictional facts not subject to attack except upon direct appeal. We respectfully submit the court below overlooked this Court's opinion in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, in which this Court expressly stated (p. 514):

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments, concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

We also respectfully submit that this Court's prior decisions in any event have not touched upon the situation where the very fact establishing the lack of federal juris-

diction was specifically found in the decree sought to be attacked or reviewed.

By virtue of Petitioner's agreement with Respondent as to the Drexel property, he had certain contract rights against Respondent. These rights were not litigated in the case of *Saxelby* v. *Taussig*. He had a right to litigate his contract action against Respondent in a tribunal of his choosing. He had a right to litigate this contract action involving, among other things, the consequences of Respondent's failure and refusal to appeal from the United States District Court's decree of June 4, 1947 without suffering the consequences of an injunction in the court below. He had a right to litigate in that proceeding the question of whether any issues—jurisdictional or otherwise—as between Petitioner, the beneficiary and grantor of a real estate trust and American National Bank and Trust Company as trustee, were in fact affected in any way by the proceedings in the case of *Saxelby* v. *Taussig*. Under these circumstances, we respectfully submit, the United States District Court for the Northern District of Illinois, Eastern Division, erred in enjoining the proceedings instituted in the Superior Court of Cook County, Illinois by Petitioner, asserting as against his former trustee, those contract rights. With respect to these issues we respectfully submit, the action of the District Court in summarily granting a permanent injunction offended the prohibition of 28 U. S. Code §2283 and offended the "hands off" policy with respect to such litigation imposed by that section of the Code.

The Motion Under Rule 60(b)(4) of the Rules of Civil Procedure for United States District Courts.

The action of the United States District Court in refusing to consider Petitioner's motion to vacate and expunge the decree of June 4, 1947, and that of the United States Court of Appeals in affirming the District Court's order, presents for determination, we respectfully submit, an important question of federal law which has not been, but should be settled by this Court.

Petitioner's motion was presented to the court below approximately ten years after the entry of the decree involved. Petitioner's motion however expressly disclaimed any intention to interfere with the divers financial settlements with the beneficiaries of the Taussig Trusts which had taken place subsequent to the entry of the decree. On the other hand, Petitioner's motion asserted that Petitioner possessed certain valuable rights against American National Bank and Trust Company and Chicago Title and Trust Company "each of which said institutions at all material times were duly apprised and had knowledge or notice of the absence of federal jurisdiction in the above entitled cause and the nature of affiant's claims." (App. 148.)

Rule 60(b)(4) now contains the language "upon such terms as are just, the Court may relieve a party * * * from a final judgment for the following reasons * * * (4) the judgment is void * * * The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment." Prior to the adoption of this rule it had always been generally understood that all courts have the inherent power to vacate, at any time, their own judgments rendered without jurisdiction. Two of the recognized authorities on federal procedure have apparently taken the position that with respect to

judgments void for want of jurisdiction, Rule 60(b)(4) has made no change and that a reasonable time within the meaning of the Rule should be interpreted as at any time at all. We refer the Court to 10 Cyclopedia of Federal Procedure, Third Edition, § 37.12, which states:

> "As to void judgments and those rendered without or beyond jurisdiction there is and can be no time limitation, since they are not existant and futile *ab initio*."

We also refer the Court to the more lengthy discussion on the same point in 7 Moore's Federal Practice, Second Edition, Sec. 60.25(4), page 274, where it states:

> "(4) Time for Motion.
>
> "Unlike clauses (1)-(3) a motion under clause (4) is not subject to a maximum time limitation of one year, but like a motion under Clauses (5) and (6) the Rule provides that the 60(b)(4) motion must be made within a reasonable time. What is the meaning of the 'reasonable time' limitation with respect to a motion for relief from a void judgment?
>
> "The theory underlying the concept of a void judgment is that it is legally ineffective—a legal nullity, and may be vacated by the court which rendered it at any time (*United States* v. *Sotis*, CCA 7th 1942, 131 F. 2d 783, 787). Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life (see *People* v. *Muller* (1930), 339 Ill. 573, 579, 171 N. E. 672; *State Bank of Prairie du Rocher, Illinois* v. *Brown* (1931), 263 Ill. App. 312, 316). * * * Further it may, when appropriately called in question be adjudged void in any collateral proceeding, and the collateral attack may be made at any time. Since a federal judgment that is void can be so collaterally attacked, and since the judgment sustaining the collateral attack would have to be given effect in a subsequent 60(b)(4) motion to set the federal judgment aside as void, 'the reasonable time' limitation must generally mean no

time limit, atlhough there may be exceptional situations where the reasonable time limitation would require diligence on the part of the movant."

This meaning of the Rule was apparently adopted by the Court of Appeals for the Eighth Circuit in *Hicklin* v. *Edwards*, 226 F. 2d 410, where that Court stated (p. 413):

> "The mandate the rule imposes on the Court to relieve a party from a judgment 'for the reason that the judgment is void' is broad and unqualified and contains no restrictions in respect to any of the reasons that may be shown to render the judgment void."

Petitioner asserted no claim against the parties with respect to whom he occupied an adversary position in the original proceeding of *Saxelby* v. *Taussig*. He believes that with respect to the assertion of his rights against his former trustee and Chicago Title and Trust Company, both of whom were notified by him to appeal from the decree of June 4, 1947; his pending litigation and any future litigation should be unimpeded by a decree which admittedly the United States District Court lacked federal jurisdiction to enter. With respect to these parties, there exists no element of estoppel calling for the imposition of terms and in view of this Court's decision in *Mitchell* v. *Mauer*, 293 U. S. 237, and also this Court's earlier decision in *Gilbert* v. *Davis*, 235 U. S. 561, and *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, since the duty to determine federal jurisdiction is a duty imposed upon the court itself, not to be affected by waiver or the agreement of the parties, logic seems to impel that consideration be given to any and all motions asserting the want of federal jurisdiction to enter a decree and that the refusal to entertain any such motion, if properly presented, must necessarily constitute an abuse of discretion to be corrected upon review.

CONCLUSION.

We respectfully submit a Writ of Certiorari should issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered April 2, 1958, and that upon such review, said Court's judgment in Cause 12137 should be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois with directions to vacate the permanent and mandatory injunctions appealed from, and with respect to that Court's judgment in Cause 12138, that said judgment be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois, with directions to grant Petitioner's motion to vacate its decree of June 4, 1947, and all subsequent decrees with respect to Respondent, American National Bank and Trust Company of Chicago, and after hearing, that said Court enter such order as may be just under the circumstances with respect to the remaining parties to said decree.

Respectfully submitted,

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APPENDIX.

Opinion of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Nos. 12137 and 12138

SEPTEMBER TERM, 1957—JANUARY SESSION, 1958

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee, etc.,
Petitioner-Appellee,
No. 12137 *vs.*
JOSEPH M. TAUSSIG,
Respondent-Appellant.

RUTH SAXELBY, ET AL.,
Plaintiffs-Appellees,
No. 12138 *vs.*
JOSEPH M. TAUSSIG, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 2, 1958.

Before FINNEGAN and HASTINGS, *Circuit Judges,* MERCER, *District Judge.*

MERCER, *District Judge.* Both appeals herein are from orders entered by the United States District Court for the Northern District of Illinois, Eastern Division, in

the case of *Ruth Saxelby, et al.*, v. *Joseph M. Taussig, et al.*, Civil Action No. 45 C 2271. This litigation has previously been before this Court in *Ex parte Joseph M. Taussig* No. 9856, October, 1947 Term, and in *Taussig* v. *Chicago Title and Trust Company*, 171 F. 2d 553.

The original complaint was filed December 20, 1945 by Ruth Saxelby, a beneficiary of a trust created under the Will of her father, Maurice Taussig. Relief was sought against her brother, Joseph M. Taussig, appellant herein, and against a co-trustee; American National Bank and Trust Company of Chicago, as Trustee, was also a defendant.

On June 4, 1947 (more than ten years ago) the District Court entered the first of seven final decrees. The first decree removed appellant and his co-trustee as testamentary trustee, appointed as their successor in trust The Northern Trust Company and directed a conveyance to the successor trustee of the real estate held by American National as land trustee for appellant. This decree also directed the appellant to execute and deliver to American National a written direction authorizing such conveyance. American National complied with the decree, conveyed the real estate to the successor trustee and advised appellant of its action. However, appellant did not execute the direction.

Thereafter, final decrees were entered October 26, 1948, December 30, 1948, June 2, 1949, October 20, 1950, May 6, 1952 and November 4, 1952. The decree of October 26, 1948 approved the Master's Report on re-reference, overruled objections and entered additional personal judgments against appellant and Robitshek, charging fees and expenses against appellant and making the same an equitable lien against his interest. The decree of December 30, 1948 settled the controversies between the parties, entered upon express stipulation of appellant, the stipula-

tion providing that s terms were conclusive upon all parties, including appellant, and provided that acts done in compliance with the decree shall not be questioned or attacked, directly or indirectly in this or any other court'. The decree of June 2, 1949 construed the Will of testator, authorized further distribution of the trust estate to beneficiaries, including appellant as one of the beneficiaries, and provided for attorney fees, including appellant's attorney. This decree was also entered pursuant to a stipulation executed by appellant. The decree of October 20, 1950 authorized a private sale of real estate, provided for distribution to the appellant out of the purchase price, liquidation of appellant's indebtedness and payment of appellant's attorney fees and expenses. This order was entered with appellant's consent. The decree of May 6, 1952 authorized payment of income tax deficiency assessments out of a reserve held in trust for this purpose. Appellant renewed his objections to the jurisdiction of the court but these objections were overruled. The decree of November 4, 1952 approved an accounting of the successor trustee; appellant objected upon jurisdictional grounds and the objections were overruled.

No appeal was taken from any of the above-mentioned decrees.

No action was taken by or requested of the District Court after the decree of November 4, 1952, until June 26, 1957 when a petition was filed by American National and a Motion was filed by appellant.

On June 6, 1957 appellant sued American National in the Superior Court of Cook County for $500,000.00, alleging that American National's conveyance in compliance with a former decree was a breach of agreement. The petition of American National filed June 26, 1957 prayed that appellant be ordered to comply with the decree of June 4, 1947 and that appellant be permanently enjoined

from prosecuting the State Court action. The court found that appellant's failure to execute and deliver to American National a proper direction was a direct violation of the 1947 decree and that the State Court action was predicated upon such violation. Appellant was ordered to execute and deliver the direction and was permanently enjoined from prosecuting the Superior Court action. The appeal in No. 12137 is taken from this order.

On the same day, June 26, 1957, appellant filed a motion 'to vacate, set aside and hold for naught and expunge from its records, this Court's final decree of June 4, 1947, all supplemental proceedings and decrees, including this Court's decree of December 30, 1948, and all other proceedings in the above cause'. The Court denied appellant's motion and the appeal in No. 12138 is taken from that order.

The contested issues in these appeals are:

(1) Whether the issues sought to be reopened by appellant after ten years delay are *res adjudicata* by reason of their prior adjudication in the unappealed decrees of the District Court in *Saxelby, et al.*, v. *Taussig, et al.*, No. 45 C 2271.

(2) Whether appellant is estopped to attack the decree of the District Court.

(3) Whether the granting of American National's petition of June 26, 1957 was a proper exercise of the District Court's power to require compliance with its decree of June 4, 1947 and to protect such decree by enjoining litigation in a state court.

(4) Whether appellant's motion to vacate and expunge from the record all final orders was correctly denied.

We are of the opinion that the District Court's decree of June 4, 1947 and subsequent decrees in which it found that it had jurisdiction are not void and the same are *res adjudicata* in this case. The case of *Sorenson, et al.*,

v. *Sutherland, et al.*, 2 Cir. 109 Fed. 2d. 714, (aff'd by Supreme Court, 311 U. S. 494) states clearly the pertinent principles of *res adjudicata* as applied to a belated attack (by motion to vacate) on an unappealed decree on the ground that the court lacked jurisdiction to enter it.

In that case a decree was entered by the District Court against the Alien Property Custodian and the Treasurer of the United States, in an action under the Trading with the Enemy Act. A jurisdictional question was whether a party named 'Sielcken' was a resident of the United States or of an enemy country, Germany, which under the Act would bar recovery. No appeal was taken by the government. About nine years later a motion was made by the Attorney General to vacate the original decree on the ground that the court lacked jurisdiction because Sielcken was, in fact, a resident of Germany. The District Court allowed the motion and entered an order vacating the original decree. The Court of Appeals reversed in an opinion which is very much in point. The pertinent part of the opinion reads as follows:

> "* * * the court was apparently of the belief that if it found Sielcken to have been in fact a resident of Germany the issues raised by the original bill and answers and necessarily determined in favor of the plaintiffs by Judge Caffey could be disregarded because his decision was based on erroneous findings affecting jurisdiction. But whatever may have been the trend of the earlier authorities the decisions of the Supreme Court in *Chicot County Drainage District* v. *Baxter State Bank, supra*, decided January 2, 1940, and *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104, make the decree of December 30, 1949, *res adjudicata* as to the issues involved in the motion to vacate. * * * In *Chicot County Drainage District* v. *Baxter State Bank, supra*, the Supreme Court held the parties to an action to be bound by a judgment of a United States District Court which

necessarily involved recognition of an act as constitutional, even though the act was later in another proceeding held to be invalid. * * * Attack on the former judgment on the ground that lack of jurisdiction made it void was therefore precluded. * * *".

In *Chicot County Drainage District v. Baxter State Bank*, 308 U. S., 371 at Page 376, the Court said:

"* * * The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

In *Treines v. Sunshine Mining Co.*, 308 U. S. 66, the Court said:

"One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues (citing *American Surety Co. v. Baldwin*, 287 U. S. 156) as well as to jurisdiction of the subject matter as of the parties."

The appellant herein having acquiesced and having sat by for ten years after the unappealed decree of June 4, 1947 was entered, having joined in the settlement decree of December 30, 1948 and having consented to the other decrees above mentioned and having agreed to be bound thereby and not to appeal therefrom or attack such decrees in any way, having permitted the successor trustee to take various irreversible actions under said decrees and having accepted benefits thereof, including acceptance of his distributive share of the proceeds of the sale of the Drexel property, is clearly subject to the rules of *res adjudicata* as well as being subject to estoppel, both of

which preclude appellant from attacking the decrees of the District Court upon any grounds.

One who accepts the benefits of a judgment decree or judicial order is estopped to deny the validity thereof. (*Wilson* v. *Union Electric L. & P. Co.*, 8th Cir., 59 F. 2d 580; *Livesay Industries* v. *Livesay Window Co.*, 5th Cir., 202 F. 2d 378.

Appellant claims his motion to vacate the final decree of June 4, 1947 and all subsequent proceedings was improperly denied. He relies on Rule 60 (b) F. R. C. P. the pertinent part of said rule providing as follows:

> "On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment order or proceeding for the following reasons: * * * (4) the judgment is void; * * *. The motion shall be made within a reasonable time. A motion made under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * Writs of *coram nobis, coram vobis, audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed by these rules or by an independent action." (28 U. S. C. A., F. R. C. P., Rule 60 (b)).

Rule 60 (b) (4) applies only to void judgments. The decree of June 4, 1947 and subsequent decrees were not void judgments, hence they are not subject to vacation under said rule. Rule 60 (b) (4) was not intended as, and it is not a substitute for a direct appeal from an erroneous judgment. This rule was not designed to circumvent the policy evidenced by the rule limiting the time for appeal. (*Ackerman* v. *United States*, 340 U. S. 193.) It should be noted that Rule 60 (b) requires that "the motion shall be made within a reasonable time." This requirement has not been met by appellant.

Appellant contends that the order upon the petition of American National Bank, which enjoined him from prose-

cuting in the State Court his suit against said bank, was erroneous. This order also directed appellant to comply *nunc pro tunc* with the decree of June 4, 1947 which required appellant to give his direction to the bank to convey the Drexel property to The Northern Trust as successor trustee under the provisions of Maurice Taussig's Will. It was evident appellant's State Court action was founded on his deliberate disobedience of the District Court's Order and it is clear that the Court on the Record before it had the power to enforce compliance with the decree. That power comes through the provision of Sec. 2283, 28 U. S. Code which expressly provides that a Court of the United States may grant an injunction to stay proceedings in a State Court 'where necessary in aid of its jurisdiction, or to protect or effectuate its judgments'. That was the purpose of the injunction. Appellant cites *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 211 F. 2d 449. This case expressly held that the injunction sought was not in aid of the federal courts' jurisdiction or to protect or effectuate a judgment of that court, the ground of the action being only that the state court action constituted an invasion of the N. L. R. B. *Toucey* v. *New York Life Insurance Company*, 314 U. S. 118, cited by appellant was rendered prior to the enactment of Sec. 2283, the purpose of which was to overcome the effect of the Toucey decision and to give federal courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts. (*Jackson* v. *Carter*, 10th Cir., 179 F. 2d 524.)

No good purpose can be accomplished in extending this opinion. We find no reasons for reversal and it is therefore ordered that the Orders of the District Court upon the Motion and upon the Petition entered on June 26, 1957, be and they are hereby affirmed.

Affirmed.